Supreme Court, U.S.
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No. 99-1113

IN THE

Supreme Court of the United States

IDIT DOBBS-WEINSTEIN,

Petitioner,

v.

VANDERBILT UNIVERSITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the plaintiff suffered an adverse employment action sufficient to establish a prima facie case of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1, *et seq.*, when she was initially denied tenure to associate professor with tenure though later promoted by the University and made whole as a result of the University's internal grievance procedure.

2. Whether the decision by the Court of Appeals for the Sixth Circuit that the defendant's denial of tenure to the plaintiff constituted an "interim decision" conflicts with this Court's decisions in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 2269, 141 L. Ed. 2d 633 (1998)?

3. Whether the decision of the Court of Appeals for the Sixth Circuit that the defendant's denial of tenure to the plaintiff in May 1994 did not constitute an "adverse employment action" conflicts with decisions by First, Third, Seventh, Ninth, Eleventh and D.C. Circuits?

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

The Respondent, Vanderbilt University, is a private, non-profit corporation chartered under the laws of the State of Tennessee. It has no parents or subsidiaries.

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42 U.S.C. §§ 2000e-1, *et seq.* . . . . . i, 2

Tennessee Human Rights Act, T.C.A. § 4-21-401 . 2

Vanderbilt University ("Vanderbilt" or the "University"), the employer of the petitioner, Idit Dobbs-Weinstein, requests this Court to deny the Petition for Certiorari. Under the specific facts of this case, the decision by the Sixth Circuit does not conflict with *Delaware State College v. Ricks* or *Burlington Industries, Inc. v. Ellerth* or the decisions by any other circuit court of appeals. The Sixth Circuit's decision that the University's initial denial of tenure does not constitute an adverse employment action, since she ultimately received tenure through Vanderbilt's internal processes and was made whole for any monetary losses, was correct based on the facts of this case and existing case law.

STATEMENT OF THE CASE

The Respondent essentially accepts the Petitioner's Statement of the Case, including the factual basis surrounding her claim. The Respondent disagrees with the statement contained in Petitioner's Statement of the Case that its Chancellor accepted the recommendation of the University's Professional Ethics and Academic Freedom ("PEAF") Committee "only" after this action was filed, although it is factually correct that the Chancellor acted after the Plaintiff had filed her complaint in the District Court. (Petition at p. 6).

As a result of the grievance filed by the Petitioner under the provisions of the University's *Faculty Manual*, Dobbs-Weinstein received promotion to associate professor with tenure and was made whole for any financial loss which she sustained as a result of the initial denial of tenure. Petitioner received her pay through August 31, 1995 and received all back pay, including an upward adjustment in her salary in November, 1995.

Through the grievance filed by Dobbs-Weinstein with the PEAF Committee, that Committee recommended that her promotion file be forwarded to the Promotions and Tenure Review Committee ("PTRC"). The effect of that recommendation, which was adopted by the University's Chancellor, was the same as an appeal by the Petitioner to the PTRC. The PTRC's ultimate recommendation that Dobbs-Weinstein be promoted to associate professor was accepted by the Chancellor and Board of Trust.

REASONS FOR DENYING THE WRIT

I.

UNDER THE SPECIFIC FACTS OF THIS CASE, THE DECISION BY THE SIXTH CIRCUIT DOES NOT CONFLICT WITH *DELAWARE STATE COLLEGE OR BURLINGTON INDUSTRIES*, OR THE DECISIONS OF ANY OTHER CIRCUIT COURT OF APPEALS.

In its decision affirming the District Court's grant of summary judgment to the respondent, Vanderbilt, dismissing the Plaintiff's claims of national origin and gender discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1, *et seq.*, and the Tennessee Human Rights Act, T.C.A. § 4-21-401, ("THRA"), the Sixth Circuit found that the Plaintiff had failed to establish that she suffered an "adverse employment action" which would give rise to a claim under Title VII or the THRA. The Court noted that since its review of the District Court's grant of summary judgment was *de novo*, it could affirm that judgment "on any ground supported by the record, even if they are different from those relied upon by the District Court." 185 F.3d at 545, n.2. After reviewing

the tenure process in effect at Vanderbilt at the time of the Plaintiff's review and appeal, the court concluded that the Dean's decision not to concur in the recommendation for promotion by Petitioner's department did not constitute an adverse employment action sufficient to establish a prima facie case of discrimination. Noting that Dobbs-Weinstein succeeded in Vanderbilt's internal grievance process, and that the University's final decision was to grant her tenure, the court concluded that she had not ". . . suffered a final or lasting adverse employment action sufficient to create a prima facie case of employment discrimination under Title VII." 185 F.3d at 546. The court reasoned that to hold otherwise would be "to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed." (*Id.*).

In its Motion for Summary Judgment before the District Court, the University argued that Dobbs-Weinstein's claim should be dismissed since it was "moot" in light of the University's award of tenure to her in November, 1995. Although the District Court rejected that argument, it found on the merits that the University was entitled to summary judgment since there was no evidence in the record to support Plaintiff's claim that she was denied tenure because of her gender or national origin.[1]

Although the University did not specifically argue that Dobbs-Weinstein had not suffered an adverse employment action, it did argue that her claim was moot since she had

1. Petitioner's reference to Dean Venable's "discriminatory decision" (Petition at p. 26) is contrary to the District Court's finding that she failed to make out a case of sex or national origin discrimination based on his decision not to concur in the Philosophy Department's recommendation that she be promoted.

received the award of tenure which she sought and had been made whole for any salary loss because of the delay in the tenure decision while her grievance worked its way through the University's process. The Petitioner argued that since she had not received interest on the back pay which she was ultimately awarded by the University, she was not in fact "made whole." Since the total interest to which the Plaintiff would have been entitled was approximately $150.00, the University argued that the amount was *de minimis* and certainly would not have justified the court's time in hearing the Plaintiff's claim on its merits, even if the District Court had not dismissed her discrimination claim.

Other courts have reached similar results on substantially similar facts. *See Howze v. Virginia Polytechnic and State Univ.*, 901 F. Supp. 1091, 1096-97 (W.D. Va. 1995); *Negussey v. Syracuse Univ.*, 1997 WL 141679 at *8-*12 (N.D.N.Y. March 24, 1997); *Davis v. City Univ. of New York*, 1996 WL 243256 at *8-*9 (S.D.N.Y. May 9, 1996).

Although there are similarities between the tenure review procedures in various universities, few of those procedures are identical. Although the grievance procedure which Plaintiff followed through the PEAF Committee was not part of Vanderbilt's tenure review process, it was a recognized forum for members of the faculty to contest adverse decisions in the tenure process. Through the review of the decision affecting the Plaintiff's status conducted by that Committee, and the subsequent acceptance of the Committee's recommendation by the University's Chancellor to have her file reviewed by the PTRC, which is part of the tenure review process, the Petitioner received the remedy which she sought — promotion to associate professor with tenure.

Petitioner's contention that the Sixth Circuit's decision is contrary to *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) is misplaced. In *Ricks*, the Court held that the plaintiff's cause of action under Title VII arose when he was advised by the university in that case that he would not receive tenure, even though he was given a one-year "terminal" contract of employment at that time. Although the decision adverse to Ricks was subject to review under Delaware State's internal grievance procedure, the Court held that his cause of action arose when he was "officially" advised that he would not receive tenure and would be terminated at the conclusion of the one year terminal contract. Had the decision on Ricks' promotion been reversed by Delaware State through its own internal grievance procedure, he, like Dobbs-Weinstein, might well have suffered no "adverse employment action" although his cause of action arose at the time of his initial notification of his failure to be promoted.

Here, the Respondent does not dispute the fact that Dobbs-Weinstein's cause of action under Title VII, or the THRA, "arose" when she was advised of the negative decision on her promotion. What the Respondent contends, and what the Sixth Circuit held, however, is that since the negative decision affecting the Plaintiff was ultimately reversed by the University through its own process, there was no "adverse" action giving rise to such a claim and that claim was properly dismissed.

Similarly, this Court's decision in *Ellerth* is of no help to the Petitioner. In *Ellerth*, the court defined those actions which would be considered "tangible" employment actions

giving rise to vicarious liability of employers for the improper actions of their agents in the sexual harassment context. *Ellerth* did not address the situation like that in the present case where an agent, even one acting improperly under Title VII, or some other statute prohibiting discriminatory conduct, made an adverse decision regarding an employee, but the employer, through its own review of that process corrected the "adverse" action. Here, the Petitioner continued to receive her regular salary and teach her courses for the year following the initial denial of her motion. Although her pay ended on August 31, 1995, and she did not begin teaching classes at the commencement of the fall, 1995, semester, she was reinstated to her position with all rights and privileges of an associate professor with tenure and made whole for any monetary loss which she had suffered between August 31 and November, 1995, including an upward adjustment of her salary to the level where it would have been had she been promoted in 1994 at the time of her initial tenure review. Clearly, she suffered no "tangible" employment action or "adverse" action for which any remedy exists under Title VII.

II.

THE PETITION SHOULD BE NOT GRANTED BECAUSE THE HOLDING IN THIS CASE IS UNIQUE TO ITS FACTS AND THE PROCEDURE IN EFFECT AT ONE UNIVERSITY.

Even if this Court should find some conflict between the Sixth Circuit's holding and the holding by other circuits in tenure cases, the writ should be denied in this case since the Sixth Circuit's decision is unique to the specific facts before the Court.

Both tenure processes and internal grievance procedures vary greatly among colleges and universities. The Sixth Circuit's holding that under the procedures in effect at Vanderbilt in 1994 and 1995, there was no adverse employment action against the Petitioner does not necessarily constitute precedential value for other cases arising under different tenure procedures at other universities. Since the Vanderbilt procedure and the recommendation of its PEAF Committee effectively resulted in an appeal of the dean's adverse decision and a subsequent review of that decision by its PTRC, the "adverse" action was effectively no more than an interim decision. The effect of a denial of tenure at a different university under different procedures, such as those at Delaware State, might well result in a different outcome. Accordingly, there is no need for this court to review the Sixth Circuit's decision in this case.

CONCLUSION

Dr. Dobbs-Weinstein's Petition for Certiorari should be denied.

Respectfully submitted,

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